

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO.:

1984CV02017

CUMBERLAND FARMS, INC.
Plaintiff,

v.

BOARD OF HEALTH OF THE
TOWN OF BARNSTABLE, BOARD OF
HEALTH OF THE TOWN OF BILLERICA,
BOARD OF HEALTH OF THE
CITY OF FRAMINGHAM; BOARD OF
HEALTH OF THE TOWN OF SHARON,
BOARD OF HEALTH OF THE
CITY OF SOMERVILLE, and BOARD
OF HEALTH OF THE TOWN OF WALPOLE,
Defendants.

COMPLAINT

INTRODUCTION

Despite Cumberland Farms, Inc. ("Cumberland Farms") being a reputable, responsible, and experienced retailer in the defendants' communities, and despite Cumberland Farms having an exemplary record of complying with laws and regulations governing the sale of age-restricted products, the defendants have recently enacted regulations suddenly prohibiting Cumberland Farms from selling existing tobacco and electronic cigarettes, while at the same time arbitrarily allowing other retailers to continue to sell the *same exact merchandise*.

Although the regulations at issue in this action are purportedly in pursuit of the well-intentioned goal of preventing underage access, they cannot be considered reasonable under any definition of the word. The regulations are counterproductive, lack any compelling connection to the stated objective, and impose anti-competitive monopolies in favor of Smoke Shops and smoking bars within defendants' jurisdictions. Cumberland Farms seeks to enjoin the defendants

from enforcing their respective regulations, as they violate a board of health's authority to enact only reasonable health regulations, are in violation of the Massachusetts Constitution, and are otherwise not in accordance with law.

To be clear, this action does not concern the merits of electronic cigarettes or tobacco use. It is a challenge to the exercise of police powers by the defendant municipal boards that compel Cumberland Farms to stop selling certain legal products, while allowing others to continue selling those very same products.

PARTIES

1. The plaintiff, Cumberland Farms, is incorporated under the laws of Delaware with its principal place of business located at 165 Flanders Road, Westborough, Massachusetts 01581.
2. The defendant, the Board of Health of the Town of Barnstable ("Barnstable"), is a division of the town government of Barnstable with a principal office located at 367 Main Street, Hyannis, Massachusetts 02601.
3. The defendant, the Board of Health of the Town of Billerica ("Billerica"), is a division of the town government of Billerica with a principal office located at 365 Boston Road, Room G03, Billerica, Massachusetts 01821.
4. The defendant, the Board of Health of the City of Framingham ("Framingham"), is a division of the city government of Framingham with a principal office located at 150 Concord Street, Framingham, Massachusetts 01702.
5. The defendant, the Board of Health of the Town of Sharon ("Sharon"), is a division of the town government of Sharon with a principal office located at 90 South Main Street, Sharon, Massachusetts 02067.

6. The defendant, the Board of Health of the City of Somerville ("Somerville"), is a division of the city government of Somerville with a principal office located at 50 Evergreen Avenue, Somerville, Massachusetts 02145.
7. The defendant, the Board of Health of the Town of Walpole ("Walpole"), is a division of the town government of Walpole with a principal office located at 135 School Street, Walpole, Massachusetts 02081.

BACKGROUND

8. On June 22, 2009, Congress enacted the Family Smoking Prevention and Tobacco Control Act ("FSPTCA"), Pub. L. No. 111-31, 123 Stat. 1776 (June 22, 2009), granting authority to the U.S. Food and Drug Administration ("FDA") to regulate tobacco products and to promulgate tobacco product standards, including with respect to characterizing flavors in cigarettes.
9. In enacting the FSPTCA, Congress granted to the FDA regulatory authority over tobacco products and tobacco product standards because the "FDA is the only agency with the right combination of scientific expertise, regulatory experience, and public health mission to oversee these [tobacco] products effectively." Representative Waxman (CA). *Congressional Record* 155:88 (June 12, 2009) p. H6652.
10. The FSPTCA sets forth a tobacco product standard in the form of a "Special Rule for Cigarettes" that prohibits the use in cigarettes of "characterizing flavors" other than tobacco and menthol. 21 U.S.C. § 387g(a)(1)(A).
11. Neither the Special Rule for Cigarettes nor any other provision of the FSPTCA prohibits the use of characterizing flavors in smokeless tobacco, electronic cigarettes, or any other non-cigarette tobacco product.

12. The Special Rule for Cigarettes is the outcome of extensive legislative debate, following which Congress decided to limit the ban on certain characterizing flavors to cigarettes, rather than applying it to smokeless tobacco and other non-cigarette tobacco products.
13. The legislative history of the FSPTCA demonstrates that Congress specifically found that a ban on menthol cigarettes could lead to “negative public health effects,” due to the large number of adult users of the products, “with unknown consequences for the health of the individual users or the overall population.” H.R. Rep. No. 111-58, pt. 1 at 38.
14. Congress also excluded menthol cigarettes from its characterizing flavor ban as the removal of the product without the FDA’s consideration and review might “unnecessarily increase the illegal black market risk, which could also pose a health hazard to users.” Id.
15. Pursuant to G. L. c. 111, § 31, boards of health of the Commonwealth of Massachusetts are empowered to make “reasonable health regulations.”
16. An Electronic Nicotine Delivery System, which is commonly known as an “electronic cigarette,” “e-cigarette”, or “vapor product,” is a battery-powered product that allows a user to inhale nicotine vapor without fire, smoke, ash, or carbon monoxide.
17. A recent invention within the last decade, vapor products are not combustible cigarettes, as they do not contain tobacco and there is no combustion or smoke.
18. Aerosol is produced by an electronic device when a battery activates a heating coil that vaporizes an e-liquid solution.
19. E-liquids are made using vegetable glycerin and/or propylene glycol, flavorings, and nicotine; however, not all e-liquids contain nicotine (otherwise known as an Electronic Non-Nicotine Delivery System) and not all e-liquids are flavored.

20. Vapor products allow consumers to mimic smoking (vaping) by inhaling the aerosol through a mouthpiece, but without exposure to combustible smoke or thousands of chemicals found in tar.
21. There is a growing body of scientific evidence that demonstrates that vapor products are far less risky than tobacco-containing cigarettes because e-liquids do not contain tobacco nor are they combusted or burned in the device.
22. The FDA has not found that nicotine or tobacco-free products that deliver nicotine are inherently unsafe. Indeed, the FDA has approved several such nicotine or tobacco-free products – nicotine gums and transdermal patches – under the safety requirements of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 351 *et seq.*
23. Similarly, there is evidence that vapor products could be used as a valuable tool as a nicotine replacement therapy in order to help reduce the use of tobacco.
24. The American Cancer Society issued a position statement on e-cigarettes in February 2018 that recommended that clinicians encourage those who will not quit smoking cigarettes to “switch to the least harmful form of tobacco product possible; switching to the exclusive use of e-cigarettes is preferable to continuing to smoke combustible products.”¹
25. In 2014, over fifty tobacco, nicotine, and public health specialists from around the world signed an open letter to the World Health Organization emphasizing the importance of tobacco harm reduction through non-combustible vapor products, noting that electronic cigarettes “could be among the most significant health innovations of the 21st Century –

¹ American Cancer Society Position Statement on Electronic Cigarettes, American Cancer Society, February 15, 2018, <https://www.cancer.org/healthy/stay-away-from-tobacco/e-cigarette-position-statement.html> (last visited June 21, 2019).

perhaps saving hundreds of millions of lives.” The health specialists cautioned global regulators that if “low-risk nicotine products” like vapor products are treated akin to traditional tobacco products and seek to reduce their use without recognizing their potential as low-risk alternatives to smoking, “they are improperly defining them as part of the problem.”²

26. As recently as February 2019, The New England Journal of Medicine published a study funded by both the National Institute for Health Research and Cancer Research UK that found that vapor products were more effective for smoking cessation than traditional nicotine-replacement therapy, when both products were accompanied by behavioral support.³
27. Data published by the Centers for Disease Control and Prevention, the FDA, and the National Cancer Institute in November 2018 showed that the proportion of adults who smoke cigarettes in the United States had reached a record low since 1965.⁴
28. Menthol cigarettes, flavored and unflavored smokeless tobacco, and flavored and unflavored pipe tobacco have been in existence for generations and there is no evidence of any increased underage usage of those products.
29. Studies have shown that the primary sources for underage users of vapor products is not from retail stores, but from peers, family members, and the internet.
30. In enacting the FSPTCA, Congress specifically preserved for the States and local authorities the ability to “enact, adopt, promulgate, and enforce any law, rule, regulation,

² Statement from Specialists in Nicotine Science and Public Health Policy, May 24, 2014.

³ Hajek P, Phillips-Waller A, Przulj D, Pesola, F. A Randomized Trial of E-Cigarettes versus Nicotine Replacement Therapy. *N. Engl. J. Med* 2019; 380:629-637.

⁴ Cigarette Smoking Among U.S. Adults Lowest Ever Recorded: 14% in 2017, CDC Newsroom, November 8, 2018.

or other measure with respect to tobacco products that is in addition to, or more stringent than” requirements under the FSPTCA. 21 U.S.C. § 387p(a)(1).

31. Within the Commonwealth of Massachusetts, this local regulatory function is given to boards of health, with the requirement that any laws, rules, regulations or other measures that might be adopted by them in addition to those found in the FSPTCA must be “reasonable.” G. L. c. 111, § 31.
32. The Massachusetts Municipal Association, Inc. (“MMA”) is a Massachusetts nonprofit corporation and private organization that describes itself as “the voice of cities and towns in Massachusetts” and describes its goals as including “public policy advocacy, membership education, intergovernmental relations, services to cities and towns.” The MMA claims that its mission is to “improve the effectiveness of local government in the Commonwealth.”
33. Specifically with respect to “tobacco control,” the MMA claims that “[t]hrough a Department of Public Health grant, the MMA offers the Municipal Tobacco Control Technical Assistance Program to help municipalities with tobacco sales and use regulations, public education and other health-related issues.”
34. The Massachusetts Association of Health Boards, Inc. (“MAHB”) is a Massachusetts non-profit corporation and private organization whose stated mission is to “assist and support boards of health in meeting their statutory and service responsibilities, through programs of education, technical assistance, representation, and resource development.”
35. The MMA, through and with the MAHB, has promulgated a “Sample Sales Regulation Restricting the Sale of Tobacco Products” (the “Sample Regulation”) that has been directed through a concerted campaign to individual boards of health for consideration

and adoption. A copy of the Sample Regulation available from the MAHB website is attached hereto as Exhibit A.

36. The Sample Regulation endorsed and marketed by the MMA and MAHB prohibits the sale of any flavored tobacco products “except in smoking bars and adult-only retail tobacco stores.”
37. Upon information and belief, the MMA and/or MAHB are driving boards of health to adopt regulations similar to the Sample Regulation, and in so doing, abrogating the duties and responsibilities of boards of health under G. L. c. 111, § 31 to make independent determinations as to whether the regulations are reasonable for their respective communities.
38. Upon information and belief, the MMA and/or MAHB are improperly advising local boards of health contrary to the statutory authority given to boards of health under G. L. c. 111, § 31.⁵
39. As a result of the efforts of the MMA and MAHB, the defendant boards of health have adopted vastly similar regulations impacting the sale of flavored tobacco products at retail establishments.
40. Many other cities and towns in Massachusetts have adopted or are considering adopting tobacco regulations that are vastly similar to the Sample Regulation endorsed by the MMA and MAHB.
41. Cumberland Farms owns and operates a chain of retail convenience stores throughout Massachusetts, including in the jurisdiction of each of the defendants.

⁵ Cumberland Farms recently made inquiries to the Director of the Public Health Division of the Town of Barnstable in connection with the new tobacco regulations and was informed that the Director sought the input of a staff member of the MAHB to determine a response to the inquiries.

42. Pursuant to G. L. c. 64C, § 2, tobacco retailers in the Commonwealth of Massachusetts must be duly licensed.
43. All of Cumberland Farms's retail convenience stores located in each of the defendants' jurisdictions have met all statutory requirements, are duly licensed to sell tobacco products in the Commonwealth, and have obtained permits from the defendants to sell tobacco products in the defendants' respective municipalities.
44. In the Commonwealth of Massachusetts, with the exception of those who turned 18 by December 31, 2018, the legal age to purchase any tobacco product, including vapor products, is 21.
45. Retail convenience stores owned and operated by Cumberland Farms have an exemplary record of complying with the age requirements on the sale of all tobacco products, as reflected by the FDA's compliance database.
46. Despite the declining smoking rates in the U.S., the number of retailers specializing in the sale of tobacco products has dramatically increased in recent years.
47. These specialized tobacco product retailers, who hold municipal permits to sell only tobacco products, are classified as "adult-only retail tobacco stores" or "retail tobacco stores" and are otherwise known as "Smoke Shops."
48. In general, Smoke Shops in Massachusetts score *remarkably and significantly below* retail convenience stores as to compliance with applicable age restrictions on the sale of tobacco products, including vapor products.
49. The same laws and regulations pertaining to the retail advertising of tobacco products that are visible to the public at-large apply equally to retail convenience stores and Smoke Shops. The marketing of tobacco products, including vapor products, on the public

facing doors and windows at many Smoke Shops effectively serve as quasi billboards for the advertising of tobacco products.

50. Retail convenience stores and Smoke Shops both need to verify the age of those who purchase age restricted products at the checkout counter.

*Barnstable's Regulation Prohibiting the
Sale of Flavored Tobacco Products*

51. On May 28, 2019, Barnstable's Board of Health voted to adopt certain amendments to Chapter 371 of the Municipal Code of the Town of Barnstable (the "Barnstable Regulation"). A copy of the Barnstable Regulation is attached hereto as Exhibit B.
52. The Barnstable Regulation is based upon the Sample Regulation and bans the sale of all flavored tobacco products.
53. The Barnstable Regulation goes into effect on June 29, 2019.
54. The Barnstable Regulation defines "tobacco product" as "[a]ny product containing, made, or derived from tobacco or nicotine that is intended for human consumption . . . including, but not limited: cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff, or electronic cigarettes, electronic cigars, electronic pipes, electronic hookah, or other similar products, regardless of nicotine content, that rely on vaporization or aerosolization."
55. In relevant part, the Barnstable Regulation defines "flavored tobacco product" as "[a]ny tobacco product or component part thereof that contains a constituent that has or produces a characterizing flavor."
56. "Characterizing flavor" is defined as "[a] distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted or detectable either prior to or during consumption of a tobacco product or component thereof, including, but not limited to, tastes or aromas

relating to fruit, chocolate, vanilla, honey, candy cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb or spice”

57. The Barnstable Regulation contains an exception for “smoking bars” and “adult-only retail tobacco stores” located in Barnstable, making it unlawful for any person to sell “any flavored tobacco product, except in smoking bars and adult-only retail tobacco stores,” (Smoke Shops).
58. The retail convenience stores owned and operated by Cumberland Farms in Barnstable do not qualify as either smoking bars or adult-only retail tobacco stores.
59. While it will prohibit Cumberland Farms from continuing to sell flavored tobacco products, the Barnstable Regulation will continue to permit smoking bars and Smoke Shops to sell flavored tobacco products.
60. Upon information and belief, the Barnstable Regulation is purportedly motivated by a concern to curb the underage use of tobacco products.
61. However, the Barnstable Board of Health did not include any findings, commentary, or any other type of explanation whatsoever that would justify the adoption of the Barnstable Regulation.
62. The Barnstable Regulation lacks any demonstrable nexus with promoting public health and safety in Barnstable, as the Barnstable Regulation allows the sale of flavored tobacco products to continue in Barnstable, so long as the sale takes place at smoking bars and Smoke Shops, and does not impose any additional protections to ostensibly prevent underage consumers from using flavored tobacco products.
63. Upon information and belief, the Barnstable Board of Health did not engage in any independent study or evaluation or make any independent findings in support of the

Barnstable Regulation, instead relying on the Sample Regulation provided to it by the MMA and/or MAHB, contrary to the mandate of G.L. c. 111, § 31.

64. Upon information and belief, the Director of the Barnstable Board of Health is seeking the advice of and being directed by the MMA and/or MAHB on matters relating to interpretation and execution of the Barnstable Regulation, although neither the MMA nor the MAHB qualifies as a G. L. c. 111, § 31 entity.⁶
65. The Barnstable Regulation does not impose any additional and/or stringent requirements on smoking bars and Smoke Shops to ostensibly safeguard that flavored tobacco products are not sold to underage purchasers, for example, verifying the age of any consumer before they enter a smoking bar or Smoke Shop.
66. The Barnstable Regulation further does not restrict in any way the publicly visible marketing of any tobacco product by smoking bars or Smoke Shops.
67. As the Barnstable Regulation only imposes point of sale obligations on sellers of tobacco products for purposes of verifying a purchaser's age, there is *no difference* between the retail convenience stores owned and operated by Cumberland Farms and smoking bars and Smoke Shops, as irrespective of where the sale of flavored tobacco products take place, Massachusetts law prohibits sales to consumers under the age of 21.
68. As the Barnstable Regulation does not include any limitation on the publicly visible marketing of tobacco products by smoking bars or Smoke Shops, all consumers, including those underage, will continue to be exposed to tobacco-related marketing to the same degree, if not more.

⁶ For example, Cumberland Farms recently contacted the Director of the Public Health Division of the Town of Barnstable in connection with the new tobacco regulations. The Director specifically noted his need to reach out to MAHB. In a voicemail message, Cumberland Farms was informed by the Director that he had "reached out to Cheryl Sbarra" at MAHB and sought her input in connection with Cumberland Farms's inquiries.

69. Retail convenience stores owned and operated by Cumberland Farms in Barnstable have an excellent record of complying with the age requirements on the sale of age restricted products, including the sale of all tobacco products.
70. Upon information and belief, the Barnstable Board of Health is not in possession of any study, data, or survey that would suggest that Cumberland Farms's excellent compliance with the age requirements on the sale of age restricted products is inaccurate.
71. The Barnstable Regulation is in direct contradiction and is inconsistent with Congress's decree that the FDA is the sole government institution capable of appropriately and effectively overseeing the regulation of tobacco products, including flavored tobacco products, and that a ban on menthol cigarettes could lead to negative public health effects.
72. Barnstable's ban on the sale of flavored tobacco products is in violation of the Massachusetts Constitution and otherwise not in accordance with law for the following reasons:
- a. The enactment of the Barnstable Regulation by the Barnstable Board of Health was arbitrary and capricious, was an abuse of discretion, was not based upon any scientific evidence or reputable study to support it, and was enacted beyond the scope of the Board of Health's authority which is empowered to adopt only reasonable health regulations; and
 - b. The Barnstable Regulation violates the Equal Protection guarantee of the Massachusetts Constitution by arbitrarily and irrationally singling out for disparate treatment those permitted to sell tobacco products in Barnstable, like

Cumberland Farms, that do not qualify as “smoking bars” or “adult-only retail tobacco stores.”

73. Unless Barnstable is preliminarily and permanently enjoined from enforcing the Barnstable Regulation, Cumberland Farms will suffer irreparable harm.

*Billerica’s Regulation Prohibiting the
Sale of Vapor Products and Flavored Tobacco Products*

74. On March 4, 2019, Billerica’s Board of Health voted to adopt an amendment to Chapter Four of the Billerica Board of Health’s Rules and Regulations (the “Billerica Regulation”). A copy of the Billerica Regulation is attached hereto as Exhibit C.
75. The Billerica Regulation is based upon the Sample Regulation and bans the sale of all vapor products.
76. The Billerica Regulation’s ban on the sale of vapor products goes into effect on July 1, 2019.
77. The Billerica Regulation also bans the sale of all flavored tobacco products.
78. The Billerica Regulation defines “electronic cigarette” as “[a]ny electronic device composed of a mouthpiece, heating element, battery and/or electronic circuits that provides vapor of liquids, regardless of nicotine content, or relies on vaporization of any solid or liquid substance, regardless of nicotine content.”
79. The Billerica Regulation defines “tobacco and/or tobacco product” as “[a]ny product containing, made, or derived from tobacco or nicotine that is intended for human consumption . . . including, but not limited: cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff, or electronic cigarettes, electronic cigars, electronic pipes, electronic hookah, or other similar products, regardless of nicotine content, that rely on vaporization or aerosolization.”

80. In relevant part, the Billerica Regulation defines “flavored tobacco product” as “[a]ny tobacco product or component part thereof that contains a constituent that has or produces a characterizing flavor.”
81. “Characterizing flavor” is defined as “[a] distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted or detectable either prior to or during consumption of a tobacco product or component thereof, including, but not limited to, tastes or aromas relating to fruit, chocolate, vanilla, honey, candy cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb or spice”
82. The Billerica Regulation’s ban on both the sale of vapor products and flavored tobacco products contains an exception for “smoking bars” and “adult-only retail tobacco stores” located in Billerica, making it unlawful for any person to sell any vapor product and “any flavored tobacco product, except in smoking bars and adult-only retail tobacco stores.”
83. The retail convenience store owned and operated by Cumberland Farms in Billerica does not qualify as either a smoking bar or a Smoke Shop.
84. While it will prohibit Cumberland Farms from continuing to sell flavored tobacco products, the Billerica Regulation will continue to permit smoking bars and Smoke Shops to sell vapor products and flavored tobacco products.
85. Upon information and belief, the Billerica Regulation is purportedly motivated by a concern to curb the underage use of vapor products and flavored tobacco products.
86. The Billerica Regulation however does not include any findings, commentary, or any other type of explanation whatsoever that equates retail stores to the sale of flavored tobacco products or vapor products to underage consumers.

87. The Billerica Regulation further relies on misinformation and unwarranted inferences.

For example, the Billerica Regulation relies upon outdated national data.

88. The Billerica Regulation lacks any demonstrable nexus with promoting public health and safety in Billerica, as the Billerica Regulation allows the sale of flavored tobacco products and vapor products to continue in Billerica, so long as the sale takes place at smoking bars and Smoke Shops, and does not impose any additional protections to ostensibly prevent underage consumers from using vapor products and flavored tobacco products.

89. The Billerica Regulation does not impose any additional and stringent requirements on smoking bars and Smoke Shops to ostensibly safeguard that flavored tobacco products and vapor products are not sold to underage purchasers, for example, verifying the age of any consumer before they enter a smoking bar or Smoke Shop.

90. The Billerica Regulation further does not restrict in any way the publicly visible marketing of any tobacco product by smoking bars or Smoke Shops.

91. As the Billerica Regulation only imposes point of sale obligations on sellers of tobacco products for purposes of verifying a purchaser's age, there is *no difference* between the retail convenience store owned and operated by Cumberland Farms and smoking bars and Smoke Shops, as irrespective of where the sale of flavored tobacco products and vapor products takes place, Massachusetts law prohibits sales to consumers under the age of 21.

92. As the Billerica Regulation does not include any limitation on the publicly visible marketing of tobacco products by smoking bars or Smoke Shops, all consumers, including those underage, will continue to be exposed to tobacco-related marketing to the same degree, if not more.

93. Retail convenience stores owned and operated by Cumberland Farms in Billerica have an excellent record of complying with the age requirements on the sale of age restricted products, including the sale of all tobacco products.
94. Upon information and belief, the Billerica Board of Health is not in possession of any study, data, or survey that would suggest that Cumberland Farms's compliance with the age requirements on the sale of age restricted products is inaccurate.
95. The Billerica Regulation also caps the number of Smoke Shops in Billerica to three (3).
96. Instead of enhancing or promoting public health, the Billerica Regulation impairs it. By banning all vapor products from Cumberland Farms, the Billerica Regulation (1) will cause an increase in adult tobacco use of combustible cigarettes; and (2) will detrimentally impair adult tobacco users' opportunity to quit the use of combustible cigarettes.
97. The Billerica Regulation is in direct contradiction and is inconsistent with Congress's decree that the FDA is the sole government institution capable of appropriately and effectively overseeing the regulation of tobacco products, including flavored tobacco products, and that a ban on menthol cigarettes could lead to negative public health effects.
98. Billerica's bans on the sale of flavored tobacco products and vapor products are in violation of the Massachusetts Constitution and otherwise not in accordance with law for the following reasons:
- a. The enactment of the Billerica Regulation by the Barnstable Board of Health was arbitrary and capricious, was an abuse of discretion, was not based upon any scientific evidence or reputable study to support it, and was enacted beyond the

scope of the Board of Health's authority which is empowered to adopt only reasonable health regulations; and

- b. The Billerica Regulation violates the Equal Protection guarantee of the Massachusetts Constitution by arbitrarily and irrationally singling out for disparate treatment those permitted to sell tobacco products and vapor products in Billerica, like Cumberland Farms, that do not qualify as "smoking bars" or "adult-only retail tobacco stores."

- 99. Unless Billerica is preliminarily and permanently enjoined from enforcing the Billerica Regulation, Cumberland Farms will suffer irreparable harm.

*Framingham's Regulation Prohibiting the
Sale of Vapor Products and Flavored Tobacco Products*

- 100. On April 25, 2019, Framingham's Board of Health voted to adopt amendments to the Regulation of the Framingham Board of Health Restricting the Sale of Tobacco Products and Smoke Accessories (the "Framingham Regulation"). A copy of the Framingham Regulation is attached hereto as Exhibit D.
- 101. The Framingham Regulation is based upon the Sample Regulation and bans the sale of all flavored tobacco products and vapor products.
- 102. The Framingham Regulation's ban on the sale of vapor products and flavored tobacco products goes into effect on January 1, 2020.
- 103. The Framingham Regulation defines "smoke accessories" as "[e]quipment, products, devices, or materials of any kind that are intended or designed for use in ingesting, inhaling, or otherwise introducing Tobacco Product . . . into the human body, including, but not limited to, . . . vaporizers, [and] vape pens"

104. The Framingham Regulation defines “tobacco product” as “[a]ny product containing, made, or derived from tobacco or nicotine that is intended for human consumption . . . including, but not limited: cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff; or electronic cigarettes, electronic cigars, electronic pipes, electronic hookah, liquid nicotine, ‘e-liquids’ or other similar products, regardless of nicotine content, that rely on vaporization or aerosolization.”
105. In relevant part, the Framingham Regulation defines “flavored tobacco product” as “[a]ny Tobacco Product or Component Part thereof that contains a Constituent that has or produces a characterizing flavor.”
106. “Characterizing flavor” is defined as “[a] distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted or detectable either prior to or during consumption of a Tobacco Product or component part thereof, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy cocoa, dessert, menthol, mint, wintergreen, alcoholic beverage, herb or spice”
107. The Framingham Regulation’s bans on the sale of vapor products and flavored tobacco products contains certain exceptions for those who possess a “Smoke Accessory Sales Permit” and for “Adult-Only Retail Tobacco Stores,” making it unlawful for a retail store that also possess a retail food permit to sell smoke accessories or flavored tobacco products. The retail convenience store owned and operated by Cumberland Farms in Framingham possess a retail food permit.
108. While it will prohibit Cumberland Farms from continuing to sell vapor products and flavored tobacco products, the Framingham Regulation will continue to permit Smoke

Shops to sell vapor products and flavored tobacco products, and those stores that possess a smoke accessory sales permit to continue selling vapor products.

109. The Framingham Regulation purports to be motivated by a concern to curb the underage use of tobacco products.
110. However, the Framingham Regulation relies on misinformation and unwarranted inferences. For example, the Framingham Regulation relies upon outdated national data and suggests that the minimum age to purchase tobacco products should be raised to 21, thereby failing to take into account that the legal to purchase tobacco products in Massachusetts is in fact 21.
111. The Framingham Regulation further acknowledges that excluding the use of vapor products, there has been “no change” in the use of other tobacco products among youths.
112. The Framingham Regulation further does not include any findings, commentary, or any other type of explanation that equates possession of a retail food permit to the sale of flavored tobacco products or vapor products to underage consumers, or any type of tobacco product for that matter.
113. The Framingham Regulation lacks any demonstrable nexus with promoting public health and safety in Framingham, as the Framingham Regulation allows the sale of flavored tobacco products and vapor products to continue in Framingham, so long as the sale takes place at Smoke Shops, or for vapor products, stores that possess a smoke accessory sales permit, and does not impose any additional protections to ostensibly prevent underage consumers from using vapor products and flavored tobacco products.
114. The Framingham Regulation does not impose any additional and stringent requirements on Smoke Shops or stores that possess a smoke accessory sales permit to ostensibly

- safeguard that flavored tobacco products and vapor products are not sold to underage purchasers, for example, verifying the age of any consumer before they enter an adult-only retail tobacco store.
115. The Framingham Regulation further does not restrict in any way the publicly visible marketing of any tobacco product by smoking bars or Smoke Shops.
116. As the Framingham Regulation only imposes point of sale obligations on sellers of tobacco products for purposes of verifying a purchaser's age, there is *no difference* between the retail convenience store owned and operated by Cumberland Farms and adult-only retail tobacco stores and stores that possess a smoke accessory sales permit, as irrespective of where the sale of flavored tobacco products and vapor products takes place, Massachusetts law prohibits sales to consumers under the age of 21.
117. As the Framingham Regulation does not include any limitation on the publicly visible marketing of tobacco products by smoking bars or Smoke Shops, all consumers, including those underage, will continue to be exposed to tobacco-related marketing to the same degree, if not more.
118. The retail convenience store owned and operated by Cumberland Farms in Framingham has as excellent record of complying with the age requirements on the sale of age restricted products, including the sale of all tobacco products.
119. Upon information and belief, the Framingham Board of Health is not in possession of any study, data, or survey that would suggest that Cumberland Farms's excellent compliance with the age requirements on the sale of age restricted products is inaccurate.
120. The Framingham Regulation also caps the number of Smoke Shops in Framingham to four (4), and the number of smoke accessory sales permits to three (3).

121. Instead of enhancing or promoting public health, the Framingham Regulation impairs it. By banning all vapor products from Cumberland Farms, the Framingham Regulation (1) will cause an increase in adult tobacco use of combustible cigarettes; and (2) will detrimentally impair adult tobacco users' opportunity to quit the use of combustible cigarettes.
122. The Framingham Regulation is in direct contradiction and is inconsistent with Congress's decree that the FDA is the sole government institution capable of appropriately and effectively overseeing the regulation of tobacco products, including flavored tobacco products, and that a ban on menthol cigarettes could lead to negative public health effects.
123. Framingham's bans on the sale of flavored tobacco products and vapor products are in violation of the Massachusetts Constitution and otherwise not in accordance with law for the following reasons:
- a. The enactment of the Framingham Regulation by the Framingham Board of Health was arbitrary and capricious, was an abuse of discretion, was not based upon any scientific evidence or reputable study to support it, and was enacted beyond the scope of the Board of Health's authority which is empowered to adopt only reasonable health regulations; and
 - b. The Framingham Regulation violates the Equal Protection guarantee of the Massachusetts Constitution by arbitrarily and irrationally singling out for disparate treatment those permitted to sell tobacco products and vapor products in Framingham, like Cumberland Farms, that also possess a retail food permit.

124. Unless Framingham is preliminarily and permanently enjoined from enforcing the Framingham Regulation, Cumberland Farms will suffer irreparable harm.

*Sharon's Regulation Prohibiting the
Sale of Flavored Tobacco Products*

125. On May 16, 2019, Sharon's Board of Health voted to adopt certain amendments to Article 22A of the Municipal Code of the Town of Sharon (the "Sharon Regulation").
126. The Sharon Regulation is based upon the Sample Regulation and bans the sale of all flavored tobacco products. A copy of the Sharon's Regulation is attached hereto as Exhibit E.
127. The Sharon Regulation goes into effect on December 31, 2019.
128. The Sharon Regulation defines a "tobacco product" as "[a]ny product containing, made, or derived from tobacco or nicotine that is intended for human consumption . . . including, but not limited: cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff; or electronic cigarettes, electronic cigars, electronic pipes, electronic hookah, liquid nicotine, 'e-liquids' or other similar products, regardless of nicotine content, that rely on vaporization or aerosolization."
129. In relevant part, the Sharon Regulation defines "flavored tobacco product" as "[a]ny tobacco product or component part thereof that contains a constituent that has or produces a characterizing flavor."
130. "Characterizing flavor" is defined as "[a] distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted or detectable either prior to or during consumption of a tobacco product or component part thereof, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, mint, menthol and wintergreen, cocoa, dessert, alcoholic beverage, herb or spice"

131. The Sharon Regulation contains an exception for “smoking bars” and “adult-only retail tobacco stores” (Smoke Shops) located in Sharon, making it unlawful for any person to sell “any flavored tobacco product, except in smoking bars and adult-only retail tobacco stores.”
132. The retail convenience store owned and operated by Cumberland Farms in Sharon does not qualify as either a smoking bar or Smoke Shop.
133. While it will prohibit Cumberland Farms from continuing to sell flavored tobacco products, the Sharon Regulation will continue to permit smoking bars and Smoke Shops to continue selling flavored tobacco products.
134. Upon information and belief, no smoking bars nor any adult-only retail tobacco stores exist in Sharon, thereby making Sharon’s prohibition on the sale of flavored tobacco products a de facto ban.
135. The Sharon Regulation purports to be motivated by a concern to curb the underage use of flavored tobacco products.
136. However, the Sharon Regulation relies on misinformation and unwarranted inferences. For example, the Sharon Regulation relies upon outdated national data and suggests that the minimum age to purchase tobacco products should be raised to 21, thereby failing to take into account that the legal to purchase tobacco products in Massachusetts is in fact 21.
137. The Sharon Regulation further does not include any findings, commentary, or any other type of explanation that equates retail stores to the sale of flavored tobacco products to underage consumers.

138. The Sharon Regulation lacks any demonstrable nexus with promoting public health and safety in Sharon, as the Sharon Regulation implicitly allows the sale of flavored tobacco products to continue in Sharon, so long as the sale takes place at smoking bars and Smoke Shops, and does not impose any additional protections to ostensibly prevent underage consumers from using flavored tobacco products.
139. The Sharon Regulation does not impose any additional and stringent requirements on smoking bars and Smoke Shops to ostensibly insure that flavored tobacco products are not sold to underage purchasers, for example, verifying the age of any consumer before they enter an adult-only retail tobacco store.
140. The Sharon Regulation further does not restrict in any way the publicly visible marketing of any tobacco product by smoking bars or Smoke Shops.
141. As the Sharon Regulation only imposes point of sale obligations on sellers of tobacco products for purposes of verifying a purchaser's age, there is *no difference* between the retail convenience store owned and operated by Cumberland Farms and smoking bars and Smoke Shops, as irrespective of where the sale of flavored tobacco products takes place, Massachusetts law prohibits sales to consumers under the age of 21.
142. As the Sharon Regulation does not include any limitation on the publicly visible marketing of tobacco products by smoking bars or Smoke Shops, all consumers, including those underage, will continue to be exposed to tobacco-related marketing to the same degree, if not more.
143. The retail convenience store owned and operated by Cumberland Farms in Sharon has as excellent record of complying with the age requirements on the sale of age restricted products, including the sale of all tobacco products.

144. Upon information and belief, the Sharon Board of Health is not in possession of any study, data, or survey that would suggest that Cumberland Farms's excellent compliance with the age requirements on the sale of age restricted products is inaccurate.
145. The Sharon Regulation is in direct contradiction and is inconsistent with Congress's decree that the FDA is the sole government institution capable of appropriately and effectively overseeing the regulation of tobacco products, including flavored tobacco products, and that a ban on menthol cigarettes could lead to negative public health effects.
146. Sharon's ban on the sale of flavored tobacco products is in violation of the Massachusetts Constitution and otherwise not in accordance with law for the following reasons:
- a. The enactment of the Sharon Regulation by the Sharon Board of Health was arbitrary and capricious, was an abuse of discretion, was not based upon any scientific evidence or reputable study to support it, and was enacted beyond the scope of the Board of Health's authority which is empowered to adopt only reasonable health regulations; and
 - b. The Sharon Regulation violates the Equal Protection guarantee of the Massachusetts Constitution by arbitrarily and irrationally singling out for disparate treatment those permitted to sell tobacco products in Sharon, like Cumberland Farms, that do not qualify as "smoking bars" or "adult-only retail tobacco stores."
147. Unless Sharon is preliminarily and permanently enjoined from enforcing the Sharon Regulation, Cumberland Farms will suffer irreparable harm.

*Somerville's Regulation Prohibiting the
Sale of Vapor Products and Flavored Tobacco Products*

148. On December 13, 2018, the Somerville Board of Health voted to adopt an amendment to the Regulation of the Somerville Board of Health Restricting the Sale of Tobacco Products (the "Somerville Regulation"). A copy of the Somerville Regulation is attached hereto as **Exhibit F**.
149. The Somerville Regulation is based upon the Sample Regulation and purports to ban the sale of all vapor products.
150. The Somerville Regulation also bans the sale of all flavored tobacco products.
151. The Somerville Regulation's ban on the sale of vapor products and flavored tobacco products went into effect on April 1, 2019.
152. The Somerville Regulation defines "e-cigarette" as "[a]ny electronic device composed of a mouthpiece, heating element, battery and/or electronic circuits that relies on vaporization or aerosolization."
153. The Somerville Regulation defines "tobacco product" as "[a]ny product containing, made, or derived from tobacco or nicotine that is intended for human consumption . . . including, but not limited to: cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff, or electronic cigarettes, electronic cigars, electronic pipes, electronic hookah, or other similar products, regardless of nicotine content, that rely on vaporization or aerosolization."
154. In relevant part, the Somerville Regulation defines "flavored tobacco product" as "[a]ny tobacco product or component part thereof that contains a constituent that has or produces a characterizing flavor."

155. “Characterizing flavor” is defined as “[a] distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted or detectable either prior to or during consumption of a tobacco product or component thereof, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, menthol, mint, wintergreen, candy, cocoa, dessert, alcoholic beverage, herb or spice”
156. The Somerville Regulation’s ban on both the sale of vapor products and flavored tobacco products contains an exception for “smoking bars” and “retail tobacco stores” (Smoke Shops) located in Somerville, making it unlawful for any person to sell any vapor product and any flavored tobacco product, “except in smoking bars and retail tobacco stores.”
157. Under the Somerville Regulation, a “retail store” is defined as “[a]ny establishment that sells goods, articles, or personal services to the public.” The retail convenience store owned and operated by Cumberland Farms in Somerville falls within this definition.
158. The Somerville Regulation permits a retail store to sell “(1) tobacco-flavored tobacco products such as cigarettes, cigars, chew tobacco, spit tobacco and any product that contains parts of leaves and/or stems of a tobacco plant and (2) unflavored solutions that are designed to be vaporized or aerosolized.”
159. The Somerville Board of Health did not define what constitutes a “solution” that is “designed to be vaporized or aerosolized” in the Somerville Regulation.
160. By definition, vapor products, which can be unflavored, is an alternative solution to combustible cigarettes that is designed to be vaporized or aerosolized.
161. While it prohibits Cumberland Farms from continuing to sell flavored tobacco products and vapor products, the Somerville Regulation continues to permit smoking bars and Smoke Shops to sell flavored tobacco products and vapor products.

162. The Somerville Regulation purports to be motivated by a concern to curb the underage use of flavored tobacco products and vapor products.
163. However, the Somerville Regulation relies on misinformation and unwarranted inferences. For example, the Somerville Regulation relies upon outdated national data and suggests that the minimum age to purchase tobacco products should be raised to 21, thereby failing to take into account that the legal age to purchase tobacco products in Massachusetts is in fact 21.
164. The Somerville Regulation further does not include any findings, commentary, or any other type of explanation that equates retail stores to the sale of flavored tobacco products or vapor products to underage consumers.
165. The Somerville Regulation lacks any demonstrable nexus with promoting public health and safety in Somerville, as the Somerville Regulation allows the sale of flavored tobacco products and vapor products to continue in Somerville, so long as the sale takes place at smoking bars and Smoke Shops, and does not impose any additional protections to ostensibly prevent underage consumers from using vapor products and flavored tobacco products.
166. The Somerville Regulation does not impose any additional and stringent requirements on smoking bars and retail tobacco stores to ostensibly insure that flavored tobacco products and vapor products are not sold to underage purchasers, for example, verifying the age of any consumer before they enter a smoking bar or Smoke Shop.
167. The Somerville Regulation further does not restrict in any way the publicly visible marketing of any tobacco product by smoking bars or Smoke Shops.

168. As the Somerville Regulation only imposes point of sale obligations on sellers of tobacco products for purposes of verifying a purchaser's age, there is *no difference* between the retail convenience store owned and operated by Cumberland Farms and smoking bars and Smoke Shops, as irrespective of where the sale of flavored tobacco products and vapor products takes place, Massachusetts law prohibits sales to consumers under the age of 21.
169. As the Somerville Regulation does not include any limitation on the publicly visible marketing of tobacco products by smoking bars or Smoke Shops, all consumers, including those underage, will continue to be exposed to tobacco-related marketing to the same degree, if not more.
170. The retail convenience store owned and operated by Cumberland Farms in Somerville has as excellent record of complying with the age requirements on the sale of age restricted products, including the sale of all tobacco products.
171. Upon information and belief, the Somerville Board of Health is not in possession of any study, data, or survey that would suggest that Cumberland Farms's excellent compliance with the age requirements on the sale of age restricted products is inaccurate.
172. Instead of enhancing or promoting public health, the Somerville Regulation impairs it. By banning all vapor products from Cumberland Farms, the Somerville Regulation (1) will cause an increase in adult tobacco use of combustible cigarettes; and (2) will detrimentally impair adult tobacco users' opportunity to quit the use of combustible cigarettes.
173. The Somerville Regulation is in direct contradiction and is inconsistent with Congress's decree that the FDA is the sole government institution capable of appropriately and effectively overseeing the regulation of tobacco products, including flavored tobacco

products, and that a ban on menthol cigarettes could lead to negative public health effects.

174. Somerville's bans on the sale of flavored tobacco products and vapor products are in violation of the Massachusetts Constitution and otherwise not in accordance with law for the following reasons:

- a. The enactment of the Somerville Regulation by the Somerville Board of Health was arbitrary and capricious, was an abuse of discretion, was not based upon any scientific evidence or reputable study to support it, and was enacted beyond the scope of the Board of Health's authority which is empowered to adopt only reasonable health regulations;
- b. The Somerville Regulation violates the Equal Protection guarantee of the Massachusetts Constitution by arbitrarily and irrationally singling out for disparate treatment those permitted to sell tobacco products and vapor products in Somerville, like Cumberland Farms, that do not qualify as "smoking bars" or "retail tobacco stores."; and
- c. The Somerville Regulation violates the Due Process guarantee of the Massachusetts Constitution because it is unconstitutionally vague as it fails to provide a person of ordinary intelligence fair notice of what is prohibited.

175. Unless Somerville is preliminarily and permanently enjoined from enforcing the Somerville Regulation, Cumberland Farms will suffer irreparable harm.

*Walpole's Regulation Prohibiting the
Sale of Flavored Tobacco Products*

176. On May 21, 2019, Walpole's Board of Health voted to an amendment to the Regulation of the Walpole Board of Health Restricting the Sale of Tobacco Products (the "Walpole Regulation"). A copy of the Walpole Regulation is attached hereto as Exhibit G.
177. The Walpole Regulation is based upon the Sample Regulation and bans the sale of all flavored tobacco products.
178. The Walpole Regulation goes into effect on August 1, 2019.
179. In relevant part, the Walpole Regulation defines "flavored tobacco product" as "[a]ny tobacco product or component part thereof that contains a constituent that has or produces a characterizing flavor."
180. "Characterizing flavor" is defined as "[a] distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted or detectable either prior to or during consumption of a tobacco product or component thereof, including, but not limited to, tastes or aromas relating to fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint or wintergreen, herb or spice"
181. The Walpole Regulation contains an exception for "smoking bars" and "retail tobacco stores" (Smoke Shops) located in Walpole, making it unlawful for any person to sell "any flavored tobacco product, except in smoking bars and retail tobacco stores."
182. The retail convenience stores owned and operated by Cumberland Farms in Walpole do not qualify as either smoking bars or Smoke Shops.
183. While it will prohibit Cumberland Farms from continuing to sell flavored tobacco products, the Walpole Regulation will continue to permit smoking bars and Smoke Shops to sell flavored tobacco products.

184. However, according to the Walpole Regulation, smoking bars are prohibited in Walpole.
185. The Walpole Regulation is purportedly motivated by a concern to curb the underage use of flavored tobacco products.
186. However, the Walpole Regulation relies on misinformation and unwarranted inferences. For example, the Walpole Regulation relies upon outdated national data and suggests that the minimum age to purchase tobacco products should be raised to 21, thereby failing to take into account that the legal to purchase tobacco products in Massachusetts is in fact 21.
187. The Walpole Regulation further does not include any findings, commentary, or any other type of explanation that equates retail stores to the sale of flavored tobacco products to underage consumers.
188. The Walpole Regulation lacks any demonstrable nexus with promoting public health and safety in Walpole, as the Walpole Regulation allows the sale of flavored tobacco products to continue in Walpole, so long as the sale takes place at Smoke Shops, and does not impose any additional protections to ostensibly prevent underage consumers from using flavored tobacco products.
189. The Walpole Regulation does not impose any additional and/or stringent requirements on Smoke Shops to ostensibly safeguard that flavored tobacco products are not sold to underage purchasers, for example, verifying the age of any consumer before they enter a retail tobacco store.
190. The Walpole Regulation further does not restrict in any way the publicly visible marketing of any tobacco product by Smoke Shops.

191. As the Walpole Regulation only imposes point of sale obligations on sellers of tobacco products for purposes of verifying a purchaser's age, there is *no difference* between the retail convenience stores owned and operated by Cumberland Farms and Smoke Shops, as irrespective of where the sale of flavored tobacco products take place, Massachusetts law prohibits sales to consumers under the age of 21.
192. As the Walpole Regulation does not include any limitation on the publicly visible marketing of tobacco products by smoking bars or Smoke Shops, all consumers, including those underage, will continue to be exposed to tobacco-related marketing to the same degree, if not more.
193. Retail convenience stores owned and operated by Cumberland Farms in Walpole have an excellent record with complying with the age requirements on the sale of age restricted products, including the sale of all tobacco products.
194. Upon information and belief, the Walpole Board of Health is not in possession of any study, data, or survey that would suggest that Cumberland Farms's excellent compliance with the age requirements on the sale of age restricted products is inaccurate.
195. The Walpole Regulation also caps the number of Smoke Shops in Walpole to two (2). Upon information and belief, there is only one (1) Smoke Shop in Walpole, thereby providing it with a de facto monopoly on the sale of flavored tobacco products in Walpole.
196. The Walpole Regulation is in direct contradiction and is inconsistent with Congress's decree that the FDA is the sole government institution capable of appropriately and effectively overseeing the regulation of tobacco products, including flavored tobacco

products, and that a ban on menthol cigarettes could lead to negative public health effects.

197. Walpole's ban on the sale of flavored tobacco products is in violation of the Massachusetts Constitution and otherwise not in accordance with law for the following reasons:

- a. The enactment of the Walpole Regulation by the Walpole Board of Health was arbitrary and capricious, was an abuse of discretion, was not based upon any scientific evidence or reputable study to support it, and was enacted beyond the scope of the Board of Health's authority which is empowered to adopt only reasonable health regulations; and
- b. The Walpole Regulation violates the Equal Protection guarantee of the Massachusetts Constitution by arbitrarily and irrationally singling out for disparate treatment those permitted to sell tobacco products in Walpole, like Cumberland Farms, that do not qualify as "smoking bars" or "retail tobacco stores."

198. Unless Walpole is preliminarily and permanently enjoined from enforcing the Walpole Regulation, Cumberland Farms will suffer irreparable harm.

COUNT I
DECLARATORY RELIEF PURSUANT TO G. L. c. 231A
(Against All Defendants)

199. Cumberland Farms repeats and reavers the allegations set forth in the paragraphs above as if expressly and fully restated here.

200. Pursuant to G. L. c. 111, § 31, boards of health in Massachusetts may only make "reasonable health regulations."

201. The word “reasonable” is defined as “fair, proper, or moderate under the circumstances; sensible.” Black’s Law Dictionary (11th ed. 2019).
202. The bans on flavored tobacco products by Barnstable, Billerica, Framingham, Sharon, Somerville, and Walpole and the bans on vapor products by Billerica, Framingham, and Somerville are anything but reasonable, as there is no rational connection between the bans and the purported objective to prevent underage consumers from accessing the subject products, as the regulations, among other things:
- a. compel Cumberland Farms to stop selling certain lawful products while allowing Smoke Shops and smoking bars to continue selling the very same products, and without imposing any additional operating and/or marketing requirements that would ostensibly prevent underage consumers from using the subject products;
 - b. penalize Cumberland Farms, which has a long and excellent record of complying with the legal restrictions on the sale of tobacco products, while rewarding Smoke Shops and smoking bars, which demonstrably lack such compliance history;
 - c. neglect relevant evidence that underage purchasers in Massachusetts generally, and in the defendants’ respective jurisdictions specifically, are *not* obtaining the prohibited products from Cumberland Farms;
 - d. are the result of improper delegation to, and unjustified reliance upon, private entities to promulgate local law in the form of ministerial adoption of the Sample Regulation, without even cursory investigation to justify the adoption of the regulations;
 - e. reduce the availability of legal products from the market without any consideration of the potential adverse public health consequences;

- f. impair the public health by severely restricting the availability of legal products that can be used as a tool to reduce the use of tobacco products;
 - g. reward Smoke Shops and smoking bars with anti-competitive market dominance by removing Cumberland Farms and other convenience retailers from the marketplace.
203. The defendants' regulations are unfair, improper, nonsensical, anti-competitive, and overly draconian under the circumstances.
204. The aforementioned regulations are arbitrary and capricious, are an abuse of discretion, are not based upon any scientific evidence or reputable study to support them, and are enacted beyond the scope of a board of health's authority which is empowered to adopt only reasonable health regulations.
205. Cumberland Farms is entitled to a declaration that the defendants' regulations are beyond the scope of the authority of a board of health to only adopt reasonable health regulations.

COUNT II
EQUAL PROTECTION
UNDER THE MASSACHUSETTS CONSTITUTION
(Against All Defendants)

206. Cumberland Farms repeats and reavers the allegations set forth in the paragraphs above as if expressly and fully restated here.
207. The Massachusetts Constitution provides that "all people are born free and equal and have certain natural, essential and unalienable rights" including the right to equal protection of the laws.
208. The bans on flavored tobacco products by Barnstable, Billerica, Framingham, Sharon, Somerville, and Walpole and the bans on vapor products by Billerica, Framingham, and Somerville arbitrarily compel Cumberland Farms to stop selling certain legal tobacco

products, while allowing other establishments within the defendants' jurisdiction to continue to do so in violation of the Equal Protection clause of the Massachusetts Constitution.

209. The defendants' regulations treat retailers of identical products differently and arbitrarily, and irrationally distinguishes between them for disparate treatment.

210. The defendants' regulations violate the Equal Protection clause of the Massachusetts Constitution and, therefore, are invalid and must not be enforced.

211. Compelling Cumberland Farms to stop selling certain products, but allowing other outlets to continue selling the same products, bears no rational relationship to a legitimate state interest.

212. Cumberland Farms is entitled to: (a) a declaration that the defendants' regulations are in violation of the Equal Protection clause of the Massachusetts Constitution; and (b) an injunction prohibiting the defendants from applying the regulations.

COUNT III
DUE PROCESS
UNDER THE MASSACHUSETTS CONSTITUTION
(Against Somerville)

213. Cumberland Farms repeats and reavers the allegations set forth in the paragraphs above as if expressly and fully restated here.

214. Vague laws violate due process because individuals do not receive fair notice of the conduct proscribed by a statute.

215. A law is void for vagueness if persons of common intelligence must necessarily guess at its meaning and differ as to its application.

216. The Somerville Regulation is impermissibly vague and standardless in that it prohibits conduct on one hand but on the other, implicitly suggests that such conduct may be allowed.
217. The Somerville Regulation is unenforceable under the Due Process provisions of the Massachusetts Constitution.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff, Cumberland Farms, Inc., respectfully requests that this Honorable Court award the following relief:

- (1) Declare that under G. L. c. 111, § 31, the defendants' regulations are invalid, as they are arbitrary and capricious, are an abuse of discretion, are not based upon any scientific evidence or reputable study to support them, and are enacted beyond the scope of a board of health's authority which is empowered to adopt only reasonable health regulations;
- (2) Declare that the defendants' regulations violate the Equal Protection clause of the Massachusetts Constitution and, therefore, are invalid and must not be enforced;
- (3) Declare that the Somerville Regulation violates the Due Process provisions of the Massachusetts Constitution and, therefore, is invalid and must not be enforced;
- (4) Issue a preliminary injunctions prohibiting the defendants from enforcing their regulations until such time as the court has had an opportunity to issue a final decision on the merits of this complaint; and
- (5) Grant such other and further relief as this court may deem just and proper.

By Its Attorneys,
CUMBERLAND FARMS, INC.



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Dated: June 24, 2019